IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	I.D. No. 0806025309
TERRY L. MOORE,	)	
	)	
Defendant.	)	

Submitted: December 10, 2008
Decided: February 9, 2009

On Defendant's Motion to Suppress.
DENIED.

MEMORANDUM OPINION

Steven P. Wood, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware.

Bradley V. Manning, Esquire, Assistant Public Defender, Office of the Public Defender, Wilmington, Delaware.

COOCH, J.

I. INTRODUCTION

The instant Motion to Suppress arises from a stop and frisk on the night of June 18, 2007, during which a loaded magazine and pistol were seized from Defendant's person. For the following reasons, the Court holds that the evidence was not seized in violation of Defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution nor under Article I, Section 6 of the Delaware Constitution. Specifically, the Court holds that the police officer's initial instruction to Defendant to "show me your hands" did not, under the circumstances of this case, constitute a seizure at that time because the officer's safety was then at issue; rather, the seizure occurred seconds later when Defendant was ordered to place his hands on the patrol car. (Under either conclusion of when the seizure occurred, the result remains the same because the police officer had reasonable and articulable suspicion at the time she asked to see Defendant's hands and when she told Defendant to place his hands on the patrol car.)

II. FACTS AND PROCEDURAL HISTORY

At approximately 11:15 p.m. on June 18, 2007, the New Castle County Police began receiving reports about a large group of "disorderly black men" who were yelling at and threatening each other in the vicinity of Spencer Park townhouses, located off Old Forge Road in New Castle,

Delaware.[1] Sergeant Claudia Malone, a sixteen-year veteran of the New Castle County Police, was on street patrol duty that evening and was monitoring radio traffic.[2] She testified that Spencer Park townhouses is a "high call for service area," which she defined as a high crime area in the Old Forge corridor with drug and gun violations, giving rise to frequent calls for police service.[3] Via radio, Sgt. Malone learned further that an argument had erupted between "several black males and black females" on Cathy Court, off of Old Forge Road.[4] One subject allegedly had been stabbed and fled on foot, and an officer on scene advised that he heard shots fired.[5]

Based on these reports, Sgt. Malone responded toward Cathy Court and Old Forge Road.[6] Sgt. Malone proceeded just west of Cathy Court because she did not hear of any officers checking that area.[7] About two to four minutes after hearing the reports of shots fired, Sgt. Malone encountered two black males approximately 1000 feet from the intersection

[1] Tr., p. 15-17:9.

[2] *Id.* at pp. 14:16-19, 16:11-21.

[3] *Id.* at pp. 15:17-16:10.

[4] *Id.* at p. 17:1-3.

[5] *Id.* at p. 17:3-9.

[6] *Id.* at pp. 22:17-23:2.

[7] *Id.* at p. 25:10-16.

of Cathy Court and Old Forge Road.[8] The two men were traveling on foot and proceeding west, away from the direction of Cathy Court.[9] There was no one else present in the vicinity.[10] As Sgt. Malone passed the two men in her patrol car, she noticed that one man (Defendant's companion) had his hands in his pockets and Defendant had his hands at the waist of his pants and was "fidgeting" with his waistband with both hands.[11] She made a u-turn and parked her car on the shoulder in front of Defendant and his companion and shone the patrol car's headlights on the two men to better illuminate them.[12] Sgt. Malone testified that "my first instinct was maybe that was my stab wound victim because his hands were there, it looked like he was protecting his abdomen."[13]

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[8] *Id.* at p. 27:2-6, 27:13-15.

[9] *Id.* at p. 27:13-15.

[10] *Id.* at p. 28:15-19.

[11] *Id.* at pp. 25:19-21, 28:4-6. It is highly implicit, but not explicit, from Sgt. Malone's testimony that Defendant, and not his companion, who was the individual "fidgeting" with his waistband. Also during her testimony, Sgt. Malone first stated that Defendant had his hands "at" his waistband and later testified that his hands were "in" his waistband.

[12] *Id.* at p. 26:4-6.

[13] *Id.* at p. 25:19-23.

After stopping the patrol car, Sgt. Malone exited the vehicle and asked the two men to come over and speak with her.[14] As they approached the patrol car, Sgt. Malone asked to see the two men's hands, which were still concealed in their pockets and waistband, respectively, and she testified that she "started getting the feeling that perhaps I was going to be in danger," and noted that there were no other police officers in sight.[15]

Next, Sgt. Malone directed Defendant to stand at the front of her patrol car and Defendant's companion to stand towards the rear of the vehicle, "to separate them because it was two versus one, so for my safety."[16] Sgt. Malone asked the men to place their hands on the car and questioned them as to their names and their business abroad.[17] As she was questioning Defendant, she began patting him down as a safety precaution.[18] Sgt. Malone testified, "My suspicion was raised because of the concealment of hands and also the fidgeting at the mid-section, which I knew from training and experience is a common place to conceal a firearm or any other

[14] *Id.* at p. 29:17-21.

[15] *Id.* at pp. 30:5-10, 30:17-20.

[16] *Id.* at p. 31:19-21.

[17] *Id.* at p. 32:5-11.

[18] *Id.* at p. 33:8-10.

weapon . . . ."[19] As she was patting down Defendant, she encountered a hard oblong object in his pants pocket; she asked what it was, but Defendant did not respond, so Sgt. Malone retrieved the object from his pocket and discovered it was a magazine to a .380 caliber pistol.[20] At that point, Sgt. Malone handcuffed Defendant and radioed for additional units.[21] She assisted Defendant to sit on the sloped curve of the roadway just in front of the patrol car, where he was illuminated.[22] In the process of sitting down, a .380 caliber pistol fell out of the Defendant's shorts.[23] Defendant was placed under arrest for Carrying a Concealed Deadly Weapon, Possession of a Deadly Weapon by a Person Prohibited, Receiving a Stolen Firearm and subsequently filed this motion to suppress.

III. THE PARTIES' CONTENTIONS

Defendant contends that the magazine and pistol seized should be suppressed because Sgt. Malone did not have reasonable and articulable suspicion that Defendant was engaged in or about to be engaged in criminal

[19] *Id.* at p. 33:11-15.

[20] *Id.* at pp. 33:18-44:5.

[21] *Id.* at p. 34:12-15.

[22] *Id.* at p. 34:17-19.

[23] *Id.* at pp. 34:20-35:4.

activity when she stopped him and conducted a search of his person for weapons. Rather, Defendant maintains that Sgt. Malone had no more than a "hunch" that Defendant was engaged in criminal activity, which is insufficient to constitute reasonable suspicion.[24] Specifically, Defendant contends that "the seizure occurred at the time [Sgt. Malone] did her u-turn, put her lights on . . . and pulled her car onto the opposite side of the road in such a way as to block [Defendant and his companion's] forward progress."[25]

In response, the State contends that "the Defendant was first detained when Sgt. Malone told Defendant to place his hands on her patrol car. However, . . . if one assumes *arguendo* that Defendant was detained at the moment Sgt. Malone told him to remove his hands from his pockets, the Court's analysis remains relatively unchanged."[26] The State contends that the facts, "when considered together 'through the eyes of a reasonable, trained police officer' clearly gave Sgt. Malone a reasonable [and] articulable suspicion that Defendant was, or had recently been, engaged in criminal activity . . . . The same facts provided her with a reasonable and

[24] Def. Mot. to Suppress Evidence, D.I. 16 at 3.

[25] Tr., p. 83:17-22.

[26] State's Letter. Mem., D.I. 23.

articulable suspicion that Defendant was armed, thus justifying her decision to frisk Defendant for a deadly weapon."[27]

IV. STANDARD OF REVIEW

On a Motion to Suppress arising from a warrantless search, the State bears the burden of establishing the challenged search or seizure comported with rights guaranteed the defendant by the United States Constitution, the Delaware Constitution, and Delaware statutory law. The burden of proof on a Motion to Suppress is proof by a preponderance of the evidence.[28]

V. DISCUSSION

The key issue before this Court is whether Sgt. Malone had reasonable and articulable suspicion that Defendant had committed or was about to commit a crime at the moment she stopped him and patted him down. Preliminarily (as both parties agree) the Court must determine the point at which the stop commenced.

The Delaware Supreme Court has provided an analytical framework with which to address this issue in *State v. Rollins*, a case involving the warrantless pat down search of a pedestrian who was seen by police officers

[27] *Id.* at 2.
[28] *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001); *State v. Henderson*, 906 A.2d 232, 235 (Del. Super. 2005).

placing his hand in a pocket and then removing it.[29] First, this Court must determine when the police actually detained the suspect. Next, this Court must determine "whether the officers had a reasonable and articulable suspicion to stop, detain and frisk" the subject.[30]

Pursuant to 11 *Del. C.* § 1902(a), a police officer is authorized to

> stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination.[31]

The State and Defendant agree that the term "reasonable ground," as used in Section 1902(a), is equivalent to "reasonable and articulable suspicion."[32]

Both parties discuss the implications of the Delaware Supreme Court's decision in *Jones v. State*. In *Jones*, the Delaware Supreme Court held that a seizure of a defendant, under the Delaware Constitution, was unauthorized. The facts of Jones are as follows:

> Shortly before 10:00 p.m. on February 11, 1997, the New Castle County Police Department received a 911 call reporting that a "suspicious

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[29] *State v. Rollins*, 922 A.2d 379 (Del. 2007).

[30] *Id.*

[31] 11 *Del. C.* § 1902(a).

[32] *Jones v. State*, 745 A.2d 856, 861 (noting, [f]or the purpose of this analysis, "reasonable ground" as used in Section 1902(a) has the same meaning as reasonable and articulable suspicion."); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (holding that a police officer may detain an individual for investigatory purposes for a limited scope and duration, but only if such detention is supported by a "reasonable and articulable suspicion" of criminal activity).

> black male wearing a blue coat" had been standing for some time in front of 98 Karlyn Drive in the Garfield Park area of New Castle County. The caller provided no other information, and the 911 operator failed to record the name of the caller. At approximately 9:53 p.m., Patrolman Clay Echevarria of the New Castle County Police Department was in uniform on routine car patrol of the Garfield Park area with his partner when he received a radio dispatch relaying the 911 complaint and no other information. Within three minutes of receiving the dispatch, Patrolman Echevarria and his partner arrived in the vicinity of the address referred to in the 911 call. The officers did not notice anyone in front of, or near, 98 Karlyn Drive. After circling the block, the officers drove past the area again. This time they noticed two black males standing on the sidewalk in front of 85 Karlyn Drive. One of them (the defendant Joseph Jones) was wearing a blue coat and had his hands in his coat pockets.
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> Patrolman Echevarria testified that he did not see either individual engaging in suspicious activity. He also testified that he was very familiar with Garfiled Park and its reputation as a high crime, high drug area. Although he knew many of the "regular" drug-dealers in the area, he testified that he did not recognize Jones as a person known to be involved in illegal activity.
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> Patrolman Echevarria parked his patrol car, exited the vehicle and approached Jones. He did not first ask Jones to state his name, address, business abroad or destination as required by the detention statute, 11 *Del. C.* § 1902. . . [T]he officer ordered Jones to stop and remove his hands from his coat pockets. Jones did not comply with the order. He turned and began walking away from the officers. After ordering Jones three times, without effect, to remove his hands from his coat pockets, at which time Jones threw an object over the officer's head. A struggle then ensued. After subduing and handcuffing Jones, the officers recovered the town object, a small bag containing a substance later determined to be cocaine.[33]

The *Jones* Court reversed the decision of the Superior Court that had upheld the search, holding on appeal that (1) the defendant was seized when the police officer ordered the defendant to stop and remove his hands from his coat; (2) the anonymous 911 call had not given police officers reasonable and articulable suspicion for an investigatory stop; and (3) the defendant's

[33] *Jones*, 745 A.2d at 858-59 (citations omitted).

conduct (by walking away from the police officer) in resisting illegal arrest did not justify the ensuing search and admission of evidence seized pursuant to that arrest.[34]

Jones is factually distinguishable from the instant case in several respects. First, Sgt. Malone was responding to the area just west of the location in which a fellow officer reported shots fired, unlike the officer in *Jones* who relied on an anonymous tip.[35] Second, the defendant in *Jones* had his hands in his pockets, while the defendant in this case was fidgeting with the waistband of his pants and his companion had his hands in his pockets.[36] Third, the officer in *Jones* was accompanied by a fellow police officer, while Sgt. Malone was alone and testified that she felt she was in danger.[37]

In addition, Sgt. Malone, a 16-year veteran of the New Castle County Police Department, was aware of at least the following facts at the time she told the Defendant to remove his hands from his pockets: (1) she was in a high crime area that was the source of numerous complaints involving guns

[34] *Id.* at 869, 870, 873.

[35] *Id.* at 858.

[36] *Id.* at 869.

[37] *Id.* at 858.

and drugs; (2) she was responding to citizen complaints about a large group of disorderly men; (3) within a few minutes of her first contact with Defendant a person was allegedly stabbed and fled the scene; (4) within a few minutes of her first contact with Defendant another police officer reported hearing multiple gun shots; (5) Defendant and his companion were the first pedestrians she observed near the scene of the reported gunfire; (6) she observed Defendant and his companion approximately 1000 feet away from Cathy Court only a few minutes after the report of shots fired; (7) she saw that one of the men had his hands in his pockets and the other was fidgeting with something in his waistband; and (8) her training and experience alerted her that the waistband area is a common place to conceal weapons.

The issue before this Court is whether Sgt. Malone's request to see Defendant's hands automatically constituted a seizure. The *Jones* Court found that "Jones was seized within the meaning of Section 1902 and Article I, § 6 when Patrolman Echevarria first ordered him to stop and remove his hands from his pockets."[38] If this language is taken literally, then the stop began when Sgt. Malone told Defendant to show her his hands. However, this Court does not read the above language from *Jones* as always requiring

[38] *Id.* at 869.

that a stop occurs whenever a police officer asks a person to make his hands visible, regardless of all other circumstances. Footnote 78 of *Jones* provides for some flexibility when officer safety is at issue:

> The search in this case cannot be validated on the officers' concern for their safety. The State treats the "officer safety" exception as something separate and distinct from the need for "articulable suspicion." But "officer safety," at least on this record, does not obviate the court's obligation to assess independently the legality of the officer's action. We agree with the Seventh Circuit that "while officer safety is 'both legitimate and weighty,' it cannot in all circumstances justify a search or seizure. Otherwise nearly any invasion of a person's privacy could be justified by arguing that the police needed to protect themselves from harm." Here, having one's hands in one's pockets does not, *without more*, satisfy the officer safety exception. The officer needs an articulable suspicion, appropriate to the circumstances.[39]

Thus, while the mere act of having one's hands in one's pockets does not, in and of itself, give rise to the officer safety exception, when that act is accompanied by additional facts, such as those present in this case, then officer safety may justify a request to see a subject's hands without reasonable and articulable suspicion. Importantly, Sgt. Malone was alone in a high crime area at night when she encountered Defendant and his companion and she testified that as she approached the men she "started getting the feeling that perhaps I might be in danger."[40]

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[39] *Id.* at 872 n. 78 (citations omitted) (emphasis added).

[40] Tr., p. 30:5-10.

Based on these facts, this Court finds that officer safety was an issue in this case and, therefore, Sgt. Malone's request to "show me your hands" did not constitute a stop. Rather, the stop began when Sgt. Malone asked the men to place their hands on the patrol car. At this point, a "reasonable person would have believed he was not free to leave."[41] A command to place one's hands on a police patrol car clearly "communicate[s] to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[42] It is necessary to draw this distinction in order to permit police officers who, out of justifiable concern for their safety, ask to see a subject's hands without that request being deemed a "seizure" that then automatically triggers an analysis of whether there was reasonable and articulable suspicion to effect a stop.

This Court believes that the Supreme Court in *Jones* did not intend that a stop has occurred in all situations when a police officer asks to see a subject's hands. Rather, when officer safety is a legitimate concern a police officer may direct a subject to show his hands without effecting a stop.[43]

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[41] *INS v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

[42] *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988).

[43] *See Gholdson v. State*, 1994 WL 175593 (Del.) (holding that contraband discarded by subject who fled after consenting to answer questions was admissible).

However, assuming the stop occurred when Sgt. Malone said "show me your hands," rather than when she told Defendant to place his hands on the patrol car, the analysis of whether she had reasonable and articulable suspicion for the stop remains the same. Very little time (apparently seconds) passed between Sgt. Malone's instruction to "show me your hands" and "place your hands on the car." Sgt. Malone's reasonable and articulable suspicion had crystallized prior to her request that Defendant show her his hands.

The presence or absence of reasonable and articulable suspicion to justify a detention must be evaluated based upon the totality of circumstances as viewed "through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with an officer's subjective interpretation of those facts."[44] The relevant factors must be considered together, and may not be considered separately, even if, standing alone, one or more of them is "readily susceptible to an innocent explanation."[45] The facts, described *supra*, gave Sgt. Malone a reasonable and articulable suspicion that Defendant was, or had recently been engaged in criminal activity, thus justifying her stop of Defendant pursuant to 11 *Del. C.*

[44] *Lopez-Vasquez v. State*, 956 A.2d 1280, 1288 (Del. 2008).

[45] *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

§ 1902. The same facts provided her with a reasonable and articulable suspicion that Defendant was armed, thereby justifying her decision to frisk Defendant for a weapon.[46] Based on her testimony, it was clear that Sgt. Malone's decision to frisk Defendant was designed "not to discover evidence of a crime, but to allow the officer to pursue [her] investigation without fear of violence . . . ."[47] Thus, even though Sgt. Malone had reasonable and articulable suspicion in this case at the time she directed Defendant to show his hands, concern for officer safety justified her directive to Defendant to show his hands and therefore the stop did not occur until Sgt. Malone told Defendant and his companion to place their hands on the patrol car.

VI. CONCLUSION

In light of the foregoing reasons, Defendant's Motion to Suppress is denied.

IT IS SO ORDERED.

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[46] 11 *Del. C.* § 1903. *Terry*, 392 U.S. 1; *Monroe v. State*, 2006 WL 3482182 (Del. 2006).

[47] *Adams v. Williams*, 407 U.S. 143, 146, (1971).

oc: Prothonotary